Supreme Court, U.S.
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No. 99-____

IN THE

Supreme Court of the United States

WESTERN ATLAS INC.,
Petitioner,

v.

ALEX PENNINGTON AND HAROLD G. CUNNINGHAM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff can satisfy the prima facie requirements under ERISA § 510, 29 U.S.C. § 1140, by showing that a consequence of an adverse employment action is that the plaintiff lost the opportunity to accrue additional pension benefits.

LISTING OF PARTIES

The Western Atlas Inc. corporate entity merged with and is now a wholly-owned subsidiary of Baker Hughes, Inc., a publicly-traded corporation. UNOVA, Inc., a publicly-traded corporation, is financially responsible, by matter of contract, for the outcome of this matter. Neither Baker Hughes nor UNOVA has any non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Western Atlas Inc. ("Western" or "the Company") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc is unreported. (Pet. App. 26a) The opinion of the Court of Appeals is reported at 202 F.3d 902 (6th Cir. 2000). (Pet. App. 8a) The order of the trial court denying post-trial relief and setting forth findings of fact and conclusions of law is unreported. (Pet. App. 1a)

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 2000. A petition for a panel rehearing and suggestion for rehearing en banc were denied on March 24, 2000. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Employee Retirement Income Security Act of 1974 ("ERISA") § 510, 29 U.S.C. § 1140, provides that:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, Section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or

> discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of Section 1132 of this title shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

This case presents an important and recurring issue concerning the interpretation of ERISA § 510: Whether proof that an employee's loss of the opportunity to accrue additional pension benefits as a mere consequence of an employee's termination is sufficient to establish a prima facie case that the employer acted with a specific intent to interfere with the employee's ERISA rights. This consequence is true of almost every discharge of every employee. Contrary to the decisions of the First, Third, and Eighth Circuits, the Sixth Circuit held in this case that an employer's mere awareness that the employee would lose future pension accruals due to the termination is sufficient to establish a prima facie case under § 510, ERISA's anti-interference provision. The Sixth Circuit's ruling in the instant matter effectively would allow almost every former employee to show a prima facie case under ERISA § 510 without establishing any causal link between the employment action and an intent to interfere with ERISA-protected benefits. The decision of the Sixth Circuit leaves nation-wide employers such as Western Atlas, Baker Hughes, and UNOVA, subject to different standards in different circuits for consideration of employment termination decisions.

As evidenced by the Sixth Circuit's opinion, the lower federal courts stand in a confused state concerning the application of the prima facie case to actions brought under ERISA § 510. This confusion contributed to the decision in this case that effectively eviscerates the prima facie requirement for plaintiffs pursuing a claim under § 510. In

the Sixth Circuit alone, every former employee can survive summary judgment and present his case to the trier of fact without any evidence of a motivation to interfere with his pension benefits simply by showing that the employer was "aware" that the termination would cause the employee to lose future pension accruals. Virtually every employer will know this, but this does not demonstrate evidence of an intent to interfere with ERISA-protected rights, as the First, Third, and Eighth Circuits have found. The Sixth Circuit's decision is contrary to the other courts of appeals that have considered the issue, and Western respectfully asks this Court to make this law uniform in its application in every circuit.

1. The Underlying Dispute

Alex Pennington and Harold Cunningham, former employees of Western, were laid off from Western and their employment terminated effective in September of 1993. They subsequently brought suit, alleging that the lay-offs violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626, ERISA § 510, and Cunningham also brought a claim based on the Fair Labor Standards Act ("FLSA"). After a jury trial before the United States District Court for the Eastern District of Kentucky, the trial judge granted judgment as a matter of law for Western and against Cunningham on the FLSA claim, concluding that Cunningham was exempt from overtime requirements of the statute as a matter of law. The jury subsequently rendered a verdict in favor of Western on the ADEA claims of both Plaintiffs. The jury, however, acting in its advisory capacity, found in favor of both Plaintiffs on their ERISA claims that Western laid them off in order to interfere with their pension rights. The trial judge immediately adopted the jury's advisory verdict on the ERISA claim, stating that: "If there was no right to a jury on the ERISA claim, the court will consider the jury to be an advisory jury. . . and hereby adopts its findings as those of the court." (J.A. at 67) The parties agreed to let the court fix the

damages on the ERISA claims, which the court set at $348,090 for Cunningham and $135,002 for Pennington. Western moved for post-trial relief under Rules 50 and 52, which the court denied. (Pet. App. 1a)

Western was comprised of several separate divisions, including its Material Handling Division ("MHD"), which is the division that employed Plaintiffs. MHD sold material handling systems, such as conveyor lines, to move packages and/or parts within warehouses for customers such as Federal Express and United Airlines. Western provided employment for Pennington, age 60 in 1993, for 37 years prior to his lay-off, and for Cunningham, age 59 in 1993, for 27 years.

Western had a pension plan called the "FSSP," which was a combination of an employee-funded pension program (Part I) and an employer-matching 401(k) plan (Part II). In Part I, an employee could contribute up to four percent of his salary, which was saved and invested; Western made no matching contributions to the employees who participated in Part I. An employee who participated fully in Part I could also contribute to Part II, in which the employee could contribute up to an additional four percent of his salary and Western would match fifty percent of the employee's contributions. Pennington and Cunningham both were fully vested in their accrued benefits under the plan.

Western's MHD lost more than $17 million in 1993. Management attempted to mitigate these losses by reducing costs, including administrative expenses, by consolidating the Kentucky operation from three buildings into two and by reducing other expenses, but these cost-cutting measures proved insufficient to reverse its enormous losses. The Company then concluded that it would be necessary to reduce its work force. An early retirement option was first offered. Although Cunningham was a qualified candidate for this program, he decided not to participate. After the early retirement option expired, MHD laid off 177 employees from

its Kentucky facilities, which represented more than one-third of its work force. In choosing which employees to retain, Western sought to keep those employees who had the most flexible skills for the product lines that the Company was going to continue to sell. Western did not believe these Plaintiffs had the necessary skills, and it accordingly laid off both Plaintiffs as a result of this restructuring.

2. The Sixth Circuit's Decision

The court of appeals affirmed the district court's conclusion that Plaintiffs satisfied the prima facie requirements for an interference claim under ERISA § 510 and that they presented sufficient evidence to create a question of fact on pretext under a burden-shifting analysis modified from the progeny of *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The Sixth Circuit's decision on the prima facie showing, however, is fundamentally flawed. The court began by noting that a plaintiff must establish a causal link between interference with pension benefits and the adverse employment decision, but the court then failed to consider as part of the prima facie case whether this causal link was established. (Pet. App. 14a-15a) (citing *Smith v. Ameritech*, 129 F.3d 857, 865 (6th Cir. 1997)). Instead, the court relied on the district court's finding that: "it is not really disputed that the plaintiffs have established a prima facie case. By terminating the plans at ages 59 and 60, the defendant avoided paying the additional benefits to which the plaintiffs would have become entitled." (Pet. App. 15a)

The Sixth Circuit concluded that Plaintiffs satisfied the prima facie case because it found that:

> [T]he evidence in the instant case established that Defendant ***was aware*** that terminating Plaintiffs before the age of sixty-five would interfere with an established retirement benefit (the amount of annual pension funds

> received)—i.e., the additional annual pension funds received by Plaintiffs had they worked until sixty-five years of age was known to Plaintiffs and Defendant alike.

(Pet. App. 18a) (emphasis added)

The Sixth Circuit also found that Plaintiffs established a prima facie case "based upon the proximity of Plaintiffs' discharge to their age of receiving full retirement benefits." (Pet. App. 17a) Pennington had five years remaining until he reached retirement age, and Cunningham had six years remaining The court held this proximity sufficient despite the fact that both Plaintiffs were fully vested in their pensions. (Pet. App. 17a)

After concluding that Plaintiffs made out a prima facie case, the Sixth Circuit turned to pretext. The court quoted several of the district court's findings of fact for the proposition that Plaintiffs produced additional evidence that rebutted Western's legitimate, non-discriminatory reasons. (Pet. App. 22a-23a) According to the court, Plaintiffs presented evidence that "Defendants' claims were factually false," and evidence that it was more likely than not that Western acted with an improper motive. (Pet. App. 23a) The court cited as evidence of this allegedly improper motive that Western sought to cut "benefit" costs, without considering whether these "benefit" costs equated with pension costs. Further, it erroneously cited evidence that the layoffs affected a high percentage of employees over 50, without making any finding whether this correlated with pension status or pension costs. (Pet. App. 23a) Accordingly, the court affirmed the district court's conclusion on pretext.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S RELIANCE ON A LOST OPPORTUNITY THEORY TO SUPPORT A PRIMA FACIE CASE CREATED A CIRCUIT SPLIT

The Sixth Circuit concluded, contrary to decisions of the First, Third, and Eighth Circuits, that Plaintiffs satisfied their prima facie case when the harm they alleged was a lost opportunity to accrue additional pension benefits. This lost opportunity theory relies on two foundational requirements: First, that the employer was aware of the lost opportunity, and second, that the termination was sufficiently proximate to the payout or valuation date to be able to infer unlawful interference. (Pet. App. 16a-19a) As the discussion below demonstrates, the Sixth Circuit's endorsement of the lost opportunity theory stands at odds with the position of other circuits. The Sixth Circuit's decision failed to appreciate the distinction between losing the opportunity to accrue additional pension benefits as a *mere consequence* of termination and losing this opportunity as a *motivating factor* behind the termination. *See, e.g., Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) ("[N]o ERISA cause of action lies where the loss of pension benefits was a mere consequence of, but not a motivating factor behind, a termination of employment.") (internal citations and quotations omitted); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1405 (9th Cir. 1988) (same).

A. Other Federal Courts Consistently Recognize that Mere Awareness That a Former Employee Will Lose the Opportunity to Accrue Additional Pension Benefits Cannot Support a Prima Facie Case

The Sixth Circuit incorrectly found in the instant matter, contrary to the First, Third, and Eighth Circuits, that Plaintiffs

satisfied their prima facie case by showing Western's mere awareness that Plaintiffs' terminations would cause them to lose the opportunity to accrue additional benefits. This finding departed from precedent from other circuits, and it effectively rendered the prima facie requirement meaningless in future ERISA § 510 litigation, as nearly every former employee will be able to demonstrate that the employer has knowledge of this lost opportunity.[1]

The other circuits to address the issue have required a showing at the prima facie stage greater than the general "awareness" relied upon by the Sixth Circuit. The Eighth Circuit, for example, specifically held that the plaintiff failed

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[1] Except for the Sixth Circuit, the courts of appeal also consistently hold that the deprivation of the opportunity to accrue additional benefits by itself is insufficient to satisfy the prima facie burden. The Eleventh Circuit concluded that: "The Plaintiff, however, cannot establish a prima facie case merely by showing that, as a result of the termination, he was deprived of the opportunity to accrue more benefits." *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1224 (11th Cir. 1993). The court thus required the plaintiff to produce additional evidence suggesting that the employer's decision was "directed at ERISA rights in particular." *Id.* The Eleventh Circuit in *Clark* cited to *Turner v. Schering-Plough Corp.*, 901 F.2d 335 (3d Cir. 1990) and *Clark v. Resistoflex Co.*, 854 F.2d 762, 771 (5th Cir. 1988), which established the idea that any time an employer discharges an employee, it deprives him of the opportunity to accrue additional benefits through more years of employment. "Where this is the only deprivation, a prima facie case requires some additional evidence suggesting that pension interference might have been a motivating factor." *Turner*, 901 F.2d at 348. *See, also, DeWitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 523 (3d Cir. 1997) ("This kind of deprivation occurs every time an ERISA employer discharges an employee and is not alone probative of an intent to interfere with pension rights."); *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 906 (2d Cir. 1997) (quoting *Turner*); *Lehman v. Prudential Ins. Co. of Am.*, 74 F.3d 323, 331 (1st Cir. 1996) (holding that "mere awareness of the high cost of pension obligations" was insufficient to establish discriminatory intent); *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 981 (5th Cir. 1993) (finding "lost opportunity to accrue additional benefits" insufficient to establish specific intent under § 510).

to establish a prima facie case despite the fact that her supervisor "***was aware*** of her claims of continuing medical disability." *Kinkead v. Southwestern Bell Tel. Co.*, 49 F.3d 454, 457 (8th Cir. 1995) (emphasis added). The court's decision demonstrated that evidence beyond mere awareness is necessary to survive summary judgment. Other circuits likewise adhere to this principle. The Third Circuit held that a plaintiff failed to present sufficient evidence of a prima facie case, even though the court stated earlier in its opinion that the company "***was aware*** of the effect this discharge had on Turner's pension benefits." *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 340 (3d Cir. 1990) (emphasis added). The First Circuit similarly held that a company's "***mere awareness*** of the high cost of pension obligations combined with the single isolated ambiguous remark by [a supervisor] were insufficient, by themselves to establish Prudential's discriminatory intent." *Lehman v. Prudential Ins. Co. of Am.*, 74 F.3d 323, 331 (1st Cir. 1996) (emphasis added). These circuits expressly reject the awareness rationale relied upon by the Sixth Circuit's finding below.

The Sixth Circuit's decision accordingly became the first in the nation to hold that an employer's general awareness that discharging an employee would affect his right to accrue additional pension benefits satisfies the prima facie requirement. This directly conflicts with *Turner* and its progeny, which hold that general awareness, without additional evidence, is insufficient to satisfy the prima facie standard.

In order for the Sixth Circuit to find an "awareness" of the lost opportunity to accrue additional pension benefits, it relied on paragraphs 15-17 of the district court's findings of fact. These findings, none of which even mentioned the word pension or showed interference with pension benefits, were insufficient as a matter of law to satisfy the prima facie burden. Nevertheless, the Sixth Circuit relied upon these

findings as "[e]vidence of Defendant's knowledge that they were interfering with Plaintiffs' . . . *benefits*." (Pet. App. 18a-19a) (emphasis added). The court failed to draw a distinction between pension benefits protected by § 510 and other benefits, such as medical benefits, that were not part of Plaintiffs' claims.[2]

Paragraph 15 described a spreadsheet that "sorted employee information by name, birth date, date of hire, whether the employee smoked, and benefit program information," and paragraph 16 noted that the Company had a desire to reduce "salaries and medical costs." (Pet. App. 19a) Findings 15 and 16 only spoke in general terms about benefits and medical costs, and they did not specify that the costs to which the paragraphs referred were pension costs. (Pet. App. 19a) The Sixth Circuit thus ignored the distinction between benefits and medical costs, which were not part of Plaintiffs' claims, and pension rights. Courts from other circuits have recognized that pension costs are a subset of benefit costs. *See, e.g., Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231, 239 (4th Cir. 1991) (noting that pension rights are a component of benefit costs).

Likewise, paragraph 17, where Plaintiffs' expert concluded that "the pattern of terminations during the Western Atlas downsizing was not age neutral, because more people age 50 and over were terminated than would be expected in a random process," is an improper basis for establishing the prima facie case because it relies on evidence of age discrimination rather than pension interference. (Pet. App. 19a) The jury rejected the Plaintiffs' age discrimination claim, and the expert's testimony on this point did not mention pension obligations or have any bearing on the ERISA claim. As a result, the Sixth Circuit's reliance on age evidence to show ERISA

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[2] The district court below specifically asked Plaintiffs' counsel, "You had no evidence of medical benefits, did you?" Plaintiffs' counsel responded: "No." (J.A. 988)

interference conflicts with this Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). In *Hazen Paper*, the plaintiff attempted to use evidence of pension interference to support his claim of age discrimination under the ADEA. This Court, however, found the lower court's reliance on pension interference as a proxy for age discrimination to be improper. *Id.* at 612. Other post-*Hazen* court of appeals decisions hold that: "*Hazen* teaches that we must not infer a particular type of discrimination from circumstances that merely indicate a wrongful firing of some sort." *Walton v. Mental Health Ass'n of Southeastern Penn.*, 168 F.3d 661, 669 (3d Cir. 1999); *see also Houghton v. Sipco, Inc.*, 38 F.3d 953, 960 (8th Cir. 1994) (noting that liability under the ADEA and ERISA is "conceptually distinct"); *May v. Shuttle, Inc.*, 129 F.3d 165, 171 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 927 (1998) (finding that fact that laid-off workers were an "aging" group of employees and that employer was concerned about the cost of contributions to their pensions was insufficient to establish specific discriminatory intent under § 510).

The Sixth Circuit's findings ignored the reasoning of *Hazen Paper* and the general principle that plaintiffs may not rely on evidence of one type of discrimination as a substitute for evidence of a different type of discrimination, and thus it conflicts with *Walton*, *Houghton*, and *May*. Therefore, even if the lay-offs of the Plaintiffs were improper under the ADEA (which the jury specifically rejected), such a finding would not support their claim for pension interference.

B. A Five Year Proximity Between Termination and Retirement Cannot Support a Prima Facie Case

The Sixth Circuit's reliance on a proximity theory in order to support a prima facie case has likewise been rejected by other courts. In the case below, both Plaintiffs were fully vested in their pension rights, but simply argued that Western

was aware that they would have accrued more pension benefits during the five or six years until they reached age 65. In *Rogic v. Mallinckrodt Med. Inc.*, 917 F. Supp. 671 (E.D. Mo. 1996), the plaintiff was likewise fully vested in his pension rights. He argued, however, that because he was discharged within two years of reaching age 65, his retirement benefits would have been larger two years later. The court rejected that proximity argument and concluded that the plaintiff failed to satisfy the causal connection requirement of his prima facie case. *Id.* at 680-81. Noting that none of the plaintiff's benefits were forfeited upon his termination, the court concluded: "Plaintiff's claim that he may have received larger benefits when he reached the age of sixty-five does not state a cause of action under ERISA." *Id.* at 681. The court in *Rogic* found two years to be too remote, whereas the Sixth Circuit found a sufficient proximity based on five and six years.

The Eleventh Circuit in *Clark* invoked a presumption that, because employers must pay vested employees benefits upon termination, "the fact that [the employer] released a substantial number of vested employees indicates that the terminations were not discriminatory." *Clark v. Coats & Clark, Inc.*, 990 F.2d at 1225 (holding that prima facie test not satisfied by "legitimate attempt to cut costs in general"). The court accordingly rejected proximity arguments similar to those advanced by Plaintiffs below. *Id.* at 1224-26. Other courts of appeals have likewise refused to find proximity sufficient to satisfy the prima facie case when the plaintiffs were already vested. In *DeWitt*, summary judgment was affirmed when the plaintiff was fully vested but was terminated two weeks before the plan's valuation date (which would have presumably increased her account). *DeWitt*, 106 F.3d at 523-24; *see also Turner*, 901 F.2d at 340, 347-48 (finding that two and a half year proximity was insufficient to satisfy prima facie case); *Shores v. Lucent Tech., Inc.*, 203 F.3d 822 (4th Cir. 2000) (table) (holding that *three days* failed

to generate inference of discriminatory intent at prima facie stage). Because many of these cases also rejected the lost opportunity theory endorsed by the Sixth Circuit, they further demonstrate that proximity and awareness of the lost opportunity to accrue additional benefits are insufficient to satisfy a plaintiff's prima facie burden under § 510.

II. THE COURTS OF APPEAL ARE DIVIDED ON THE PRIMA FACIE REQUIREMENTS OF ERISA § 510 CLAIMS

The confusion exhibited by the Sixth Circuit in this case and the resulting circuit split are not surprising. Because this Court has never addressed the issue of how an ERISA § 510 case should proceed, the lower federal courts have endeavored to chart their own courses. Most courts have borrowed from the burden shifting framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny, but they have not applied it consistently. As a result, circuit splits or confusion have emerged on numerous issues, including whether exhaustion of remedies is required,[3] whether a jury trial is available,[4] and the applicable statute of limitations.[5] This pattern of confusion amongst the lower federal courts has spilled over into the requirements of

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[3] *See, e.g., Chailland v. Brown & Root, Inc.*, 45 F.3d 947, 950 n.7 (5th Cir. 1995) ("The circuits are split on the general issue whether exhaustion of administrative remedies may be required for an ERISA Sec. 510 claim.") (citing cases).

[4] The District Court's decision in this case reflects the confusion over the right to a jury: "*If there was no right to a jury* on the ERISA claim, the court will consider the jury to be an advisory jury under Fed. R. Civ. P. 39(c) and hereby adopts its findings as those of the court." (Dec. 16, 1997 Order; J.A. at 67) (emphasis added).

[5] *See, e.g., Sandberg v. KPMG Peat Marwick, L.L.P.*, 111 F.3d 331, 334 (2d Cir. 1997) (noting that "[t]he circuit courts have reached disparate conclusions" on this issue).

a prima facie case.[6] No consensus has emerged on what elements must be established in order for a claim under § 510 to proceed.

The decision below reflects the confusion about causation's role in the prima facie case. The Sixth Circuit began its analysis by citing the prima facie test as formulated in *Smith v. Ameritech*, 129 F.3d 857 (6th Cir. 1997), and by noting that "the plaintiff must show that an employer had a specific intent to violate ERISA." (Pet. App. 14a) (quoting *Smith*, 129 F.3d at 865).[7] It then cited the observation in *Smith* that a plaintiff must show a causal link between pension benefits and the adverse employment decision, although this showing was not classified as part of Plaintiffs' prima facie case. (Pet. App. 14a) The Sixth Circuit approved the district court's

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[6] One formulation examines whether the plaintiff (1) belongs to a protected group; (2) was qualified for the position; and (3) was discharged or denied employment under circumstances giving rise to an inference of discrimination. *See, e.g., Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114-15 (2d Cir. 1988). The contrary formulation, and the one ostensibly relied upon by the Sixth Circuit, requires a plaintiff to show: (1) prohibited employer conduct; (2) taken for purposes of interfering; (3) with the attainment of any right to which the employee is or may become entitled. *Pennington v. Western Atlas, Inc.*, 202 F.3d 902, 906 (6th Cir. 2000). The Eighth Circuit expressly requires a causal connection showing as part of its prima facie case. *See, e.g., Kinkead v. Southwestern Bell Tel Co.*, 49 F.3d 454, 457 (8th Cir. 1995). Given these divergent interpretations, the Seventh Circuit has frankly acknowledged, "Courts differ regarding the required content of a prima facie case in the ERISA context." *Little v. Cox's Supermarkets*, 71 F.3d 637, 642 (7th Cir. 1995).

[7] Courts generally adhere to the Sixth Circuit's approach that a plaintiff must show that the employer had a specific intent to violate ERISA. *But see Morris v. Winnebago Indus. Inc.*, 936 F. Supp. 1509, 1521 (N.D. Iowa 1996) ("There appears to be some uncertainty among the circuit courts of appeal as to whether the plaintiff must prove a 'specific intent' to interfere with ERISA benefits in order to prevail on a § 510 claim."). Even though the decision below cites the proper rule, the Sixth Circuit ignored the specific intent requirement in the remainder of its opinion.

conclusion that "it is not really disputed that the plaintiffs have established a prima facie case. . . The issue, here, is whether the plaintiffs have established the necessary causal link between the pension benefits and the adverse employment decision." (Pet. App. 17a) In other words, the court first found a prima facie case existed, and then it deferred the causation consideration—"the necessary causal link" test—until the pretext phase of the case; it shifted the burden of production to Western without first determining whether Plaintiffs presented evidence of causation or of a causal link. The Sixth Circuit's apparent decision to shift causation to the pretext phase of the case directly conflicts with Eighth Circuit authority: "[T]o establish a prima facie case of deliberate interference with prospective benefits under Sec. 510, a claimant must demonstrate a causal connection between the likelihood of future benefits and an adverse employment action." *Kinkead v. Southwestern Bell Tel. Co.*, 49 F.3d 454, 457 (8th Cir. 1995); *see also Rogic v. Mallinckrodt Med., Inc.*, 917 F. Supp. 671 (E.D. Mo. 1996) (granting summary judgment when plaintiff failed "to show a causal connection between his discharge and the attainment of retirement benefits").

The Sixth Circuit's confusion about where causation falls in the burden shifting analysis, and the general confusion that has permeated the decisions of the lower federal courts on the § 510 prima facie standard, manifested itself in the circuit split described above.

III. THESE ISSUES ARE IMPORTANT AND RECURRING

At the very least, *Kinkead*, *Turner*, and *Dewitt* demonstrate that this case would have come out differently within the First, Third, and Eighth Circuits. *Kinkead* and the district court opinion in *Rogic* expressly adopted a causation requirement for the prima facie stage, whereas the Sixth

Circuit declined to do so. *Kinkead, Lehman* and *Turner* all rejected the awareness rationale relied on by the Sixth Circuit below. And *Turner* and *Rogic* refused to find sufficient proximity from two year gaps, whereas the Sixth Circuit relied on five and six year differences to establish proximity. Furthermore, given the long line of cases following *Resistoflex* and *Turner* and holding that the loss of future benefits alone is insufficient to establish causation, most other circuits would likely have reached a different outcome than the Sixth Circuit below. Supreme Court review is necessary to establish uniformity amongst the circuits and to clarify the prima facie requirements of an ERISA § 510 case.

Despite the importance of this case to the litigants, the significance of these issues extends well beyond the instant dispute. As the discussion above demonstrates, the recent proliferation of ERISA § 510 litigation has yielded inconsistent results among the circuits. This Court has not given direction on the procedural standards for consideration of ERISA § 510 cases. The only cases which this Court has accepted that even mention ERISA § 510 include *Hazen Paper*; *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997) (holding that § 510 applies to welfare plans); and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (addressing preemptive scope of ERISA § 510). None of these opinions discuss the prima facie case.[8]

Against this backdrop, it is difficult to overstate the impact of the Sixth Circuit's decision below. By ignoring an established line of precedent that found that the prima facie

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[8] In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), an employment case brought under 42 U.S.C. § 1981, Justice Brennan, writing for a four-justice minority, cited *Dister* with approval. *Id.* at 216 (Brennan, J. dissenting). He invoked *Dister* for the proposition that ERISA § 510 cases generally follow the *McDonnell Douglas* burden-shifting standard.

case is not satisfied simply because termination deprives the plaintiff of the opportunity to accrue additional benefits, the Sixth Circuit set a dangerous precedent. The effect of the Sixth Circuit's conclusion is to render meaningless the prima facie requirements in a § 510 case. A plaintiff should not be entitled to skip the prima facie showing and proceed straight to the pretext phase without producing some evidence of a causal connection between the adverse employment action and the alleged interference with pension rights. But that is precisely what happened below. Likewise, the Sixth Circuit's reliance on evidence of age discrimination as creating an inference of pension interference has broad implications. Future plaintiffs will seize on this finding in an effort to defeat summary judgment in § 510 cases even if their age discrimination claims were otherwise barred. In other words, the Sixth Circuit's decision enables plaintiffs to survive summary judgment and proceed to trial in an ERISA § 510 case *without any evidence of discrimination because of pension status.*

United States Department of Labor statistics report that in 1996-1997, over 53 million employees participated in some type of retirement plan.[9] As that number continues to grow, the number of § 510 lawsuits will increase as well. Given the nature of the Sixth Circuit's errors, this Court should intervene and reverse the Sixth Circuit's decision in order to establish uniformity among the circuit courts and to provide guidance for future litigants. This Court has remained silent about the requirements for a prima facie case under ERISA § 510, and how that case should proceed. These issues have percolated among the lower courts for several years, and

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[9] *See* U.S. Department of Labor, Bureau of Labor Statistics, *Employee Benefits in Medium and Large Private Establishments, 1997* (U.S. Government Printing Office, Washington, DC, 1999); and *Employee Benefits in Small Private Establishments, 1996* (U.S. Government Printing Office, Washington DC, 1999).

Petitioner respectfully submits that these issues are ripe for review at this time.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

[Filed Sep. 21, 1998]

Civil Action No. 94-146

ALEX PENNINGTON, *et al.*

v.

WESTERN Atlas, Inc.

Defendant.

ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 16, 1998, an oral argument was held in this matter. Teresa Cunningham represented plaintiff. Joseph E. Conley, Jr., Jennifer Hochstrasser and Gregory Rogers represented defendant. The proceedings were recorded by official court reporter Amy J. Blosser. The court having heard counsel and being advised,

IT IS ORDERED as follows:

(A) Plaintiff's motion for attorney fees and costs (Doc. #105) is hereby denied without prejudice;

(B) Plaintiff's motion for leave to supplement attorney fee request (Doc. #126) is hereby denied without prejudice.

(C) Defendant's motion for relief under Federal Rules of Civil Procedure 50(b) and 52(b) (Doc. #138-1) is hereby denied.

(D) Defendant's motion for the court to make findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52 (Doc. #138-2) is granted. Accordingly, the court hereby issues the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Alex Pennington began working for the defendant's predecessor in 1956. 12/8/97 Tr. at 2. Pennington remained with Litton Industries and was ultimately promoted to the position of "inspector" in 1981. 12/8/97 Tr. at 13. Pennington's annual evaluations indicated that he was an above standard employee. 12/8/97 Tr. at 6.

2. From August, 1993 through May, 1994, Pennington' s division suffered a reduction in force. Pennington was terminated as part of that reduction.

3. At the time of his termination, Pennington received health, pension and life benefits and earned $29,708 per year. Plaintiffs' Ex. 79. Pennington was 60 years old at his termination and planned to work until age 65. 12/8/97 Tr. at 18.

4. Because Pennington's employment ended at age 60 rather than age 65, his pension was reduced by approximately one-half. he currently receives $641 per month in pension benefits. 12/8/97 Tr. at 19.

5. In 1966, Harold Cunningham began working for Litton Industries. He was ultimately promoted to senior mechanical engineer. 12/9/97 Tr. at 57-58. He received satisfactory evaluations throughout his employment. 12/9/97 Tr. at 60. He, too, planned to work through age 65.

6. Cunningham was terminated as part of the 1993-1994 reduction in force. He was 59 years old when

terminated. At the time of his termination, he received health, pension and life insurance benefits and earned $47,164 per year. Plaintiffs' exh. 80.

7. Cunningham currently earns $12,276 in pension benefits but receives no health insurance. 12/10/97 Tr. at 53,.

8. The defendant's stated reason for terminating Pennington was that he had the lowest evaluations in his department. 12/11/97 Tr. at 102-103.

9. Individuals from Western Atlas' Human Relations Department provided Pennington's supervisor with the names of the individuals to be laid off. 12/11/97 Tr. at 98 and 102.

10. Pennington's former supervisors had no criticism of Pennington's work. 12/11/97 Tr. at 93; 12/10/97 Tr. at 84-85. Indeed, Malone, Pennington's supervisor from 1982 through 1992, rated Pennington's work satisfactory to above satisfactory and stated that his work was excellent. 12/10/97 Tr. at 84-85.

11. The defendant provided the following reasons for selecting Cunningham for termination: (1) he did not meet schedules; (2) he did not use Computer Aided Design (CAD) ; and (3) he disrupted the workplace. 12/12/97 Tr. at 6, 10 and 22.

12. Gilkes, Cunningham's immediate supervisor, evaluated Cunningham as performing "above quality work" on his 1993 evaluation. 12/11/97 Tr. at 136.

13. Coons, who worked with Cunningham from 1982 through 1992, testified that he had never witnessed Cunningham disrupting the workplace. Furthermore, Cunningham had performed contract work for Acculift since his termination from Western Atlas, and, while at

Acculift, Cunningham met all schedules. 12/10/97 Tr. at 89-91.

14. Flaig, who also worked with Cunningham, testified that Cunningham met schedules, worked on CAD, always maintained a professional attitude, and did not disrupt the workplace. 12/10/97 Tr. at 96-98.

15. In 1992, Keith Wheeler, President of the Material Handling Systems Group, and Barbara Carr, a Human Resources Department employee, asked Steven Parsley, the manager of Systems Analysis Engineering, to modify a Lotus spreadsheet that sorted employee information by name, birth date, date of hire, whether the employee smoked, and benefit program information. 12/8/97 Tr. at 11-12.

16. Wheeler and Carr told Parsley that they wanted to reduce salaries and medical costs and that they were not concerned about lawsuits. 12/8/97 Tr. at 13.

17. According to plaintiffs' expert witness, Dr. Harvey Rosen, the pattern of terminations during the Western Atlas downsizing was not age neutral because more people age 50 and over were terminated than would be expected in a random process. 12/10/97 Tr. at 15.

18. In addition, Western Atlas' pension and savings program was a combination of a 401k and a standard pension program. Western Atlas contributed part of the funds to the pension plan, and most of the credits escalate in the final years of employment. 12/10/97 Tr. at 25 and 44-45.

19. Had Cunningham remained employed at Western Atlas until age 65 , he would have received $23,548.75 per year for his life expectancy of 78.8 years. Cunningham currently receives $12,276 per year. 12/10/97 Tr. at 25 and 53; Plaintiffs' exh. 80.

20. Plaintiffs introduced evidence that Pennington's pension loss was calculated by a percentage of Cunningham's. Plaintiffs' Second Brief on Damages, exh. 1.

21. Cunningham's pension and medical cost to Western Atlas was $7,110 per year for fiscal years 1994 through 1997. Plaintiffs' exh. 39; 12/11/97 Tr. at 33-34.

22. Pennington s pension and medical cost to Western Atlas was $2,256 per year for fiscal years 1994 through 1997. Plaintiffs' exh. 39; 12/11/97 Tr. at 33-34.

23. The 10-year pension and medical savings on all older employees offered early retirement during the downsizing was $12,262,176.71. Plaintiffs' exh. 39.

24. Plaintiffs introduced evidence that benefits average 34% of pay. Plaintiffs' exh. 48.

25. Litton Industries sold the Material Handling Division in November of 1996. 12/10/97 Tr. at 55.

CONCLUSIONS OF LAW

1. To prevail on their ERISA §510 claim, plaintiffs were required to establish that the defendant had a "specific intent to violate ERISA." *Smith v. Ameritech*, 129 F.3d 857, 865 (6th Cir. 1997) (quoting *Humphreys v. Bellaire Corp.* , 966 F.2d 1037, 1043 (6th Cir. 1991)) . If there is no direct evidence of discriminatory intent, the plaintiffs may establish a prima facie case of such discrimination by demonstrating the existence of "(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." *Smith*, 129 F.3d at 865 (quoting *Humphreys*, 966 F.2d at 1043) . Once the plaintiffs establish a prima facie case, the defendant may rebut the presumption of a §510 violation by providing a legitimate, nondiscriminatory

reason for its action. *Id* The plaintiffs must then demonstrate that the defendant's stated reason is merely pretextual. *Id* "Although the plaintiff need not show that the employer's sole purpose . . . was to interfere with [plaintiff's] entitlement to benefits, he must either prove that the interference was a motivating factor in the employer's actions or prove that employer's proffered reason is unworthy of credence." *Smith*, 129 F.3d at 865 (citations and internal quotation marks omitted).

2. In this case, it is not really disputed that the plaintiffs have established a prima facie case. By terminating the plaintiffs at ages 59 and 60, the defendant avoided paying the additional benefits to which the plaintiffs would have become entitled. The issue, here, is whether the plaintiffs established the necessary causal link between the pension benefits and the adverse employment decision.

3. The defendant proffered the following reasons for selecting the plaintiffs for termination: poor performance, disrupting the workplace, and failing to use CAD. The plaintiffs offered substantial evidence (stated above) that the plaintiffs were in fact above average performers, did not disrupt the workplace and did in fact use CAD. The court, with the aid of an advisory jury, disbelieved the proffered reason for discharge.

4. Once a plaintiff has disproved the defendant's proffered reason for termination, the fact finder is entitled to infer a discriminatory reason for such termination. *Kline v. Tennessee Valley Authority*, 128 F.2d 337 (6th Cir. 1997). In this case, the plaintiff offered evidence to disprove the defendant's stated reason for termination. The court, with the aid of an advisory jury, chooses to infer that a desire to reduce

pension liability was a determining factor in the plaintiffs' discharge.

5. The court concludes that Cunningham is entitled to damages in the amount of $348,090. Pennington is entitled to damages in the amount of $135,002. Plaintiffs' Second Brief on Damages, exh. 1.

This 21st day of September, 1998.

/s/ William O. Bertelsman
WILLIAM O. BERTELSMAN, JUDGE

APENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 98-6398/6416

ALEX PENNINGTON; HAROLD GENE CUNNINGHAM,
Plaintiffs-Appellees/Cross-Appellants,

v.

WESTERN ATLAS, INC.,
Defendant-Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Kentucky at Covington
No. 94-00146—William O. Bertelsman, District Judge.

Argued: November 3, 1999
Decided and Filed: February 7, 2000

OPINION

Before: KEITH, NORRIS, and CLAY, *Circuit Judges.*

CLAY, Circuit Judge. In Case No. 98-6398, Defendant, Western Atlas, Inc., appeals from the district court's judgment ordering Defendant to pay Plaintiff, Harold Gene Cunningham, wages and benefits in the amount of $348,090, including interest, while also ordering Defendant to pay Plaintiff, Alex Pennington, wages and benefits in the amount of $135,002, including interest, in relation to the jury verdict finding that Defendant violated § 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1140. In Case No. 98-6416, Plaintiffs cross-appeal from the jury verdict rendered on December 15, 1997, finding no liability on the part of Defendant in relation to Plaintiffs'

claims brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* For the reasons set forth below, the district court's judgment is AFFIRMED in Case No. 98-6398 as well as in Case No. 98-6416.

STATEMENT OF FACTS

Procedural History

Plaintiffs, former employees of Defendant Western Atlas, Inc., were laid off from their jobs and their employment terminated effective September of 1993. Plaintiffs filed suit against Defendant on August 24, 1994, alleging that their lay-offs were in violation of the ADEA and ERISA § 510. Plaintiff Cunningham also alleged that Defendant mis-classified him as an exempt employee under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* and that Defendant failed to pay him overtime in accordance with his alleged non-exempt status.

A jury trial ensued on December 8-12, and December 15, 1997, where, at the close of the evidence, the court granted judgment as a matter of law for Defendant and against Plaintiff Cunningham on his FLSA claim, finding that Cunningham was exempt from statutory overtime requirements as a matter of law.

The jury returned its verdict on December 15, 1997, and found for Defendant on Plaintiffs' claims brought under the ADEA. Acting as an advisory jury on Plaintiffs' claims brought under ERISA § 510, the jury found in favor of Plaintiffs concluding that Defendant laid them off in order to interfere with their pension rights. The district court adopted the jury's advisory verdict, stating that "[i]f there was no right to a jury on the ER1SA claim, the Court will consider the jury to be an advisory jury . . . and hereby adopts its findings as those of the Court." (J.A. at 67.) By agreement of the parties, the district court fixed damages on the ERISA verdicts in the

amount of $348,090 in favor of Cunningham, and in the amount of $135,002 in favor of Pennington.

Defendant moved for post-trial relief on the ERISA claim under Fed. R. Civ. P. 50(b) and/or 52(b), as well as for the district court make specific findings of fact and conclusions of law regarding its decision pursuant to Fed. R. Civ. P. 52(a). On September 21, 1998, the court issued its findings of fact and conclusions of law, and denied Defendant's motion for judgment as a matter of law. Defendant filed a timely notice of appeal on October 8, 1998, and Plaintiffs filed a cross-appeal regarding their ADEA claim on October 16, 1998.

Facts

At the time of Plaintiffs' lay-offs, Defendant was a wholly-owned subsidiary of Littton Industries, Inc. Defendant was comprised of several divisions, including the division in which Plaintiffs were employed—the Material Handling Division ("MHD"). MHD sold material handling systems, such as conveyor lines, to move packages and/or parts within warehouses for customers such as Federal Express and United Air Lines. Litton sold the MHD in November of 1996.

Pennington began working for Defendant's predecessor in 1956, and remained employed by Defendant until 1993, when he was terminated as part of Defendant's workforce reduction. At the time of Pennington's termination, he earned an annual salary of $29,708 and received health, pension and life insurance benefits as part of his employment benefits package. Pennington was sixty years old at the time of his termination, but he had planned to work until the age of sixty-five. As a result of Pennington's employment being terminated at age sixty rather than age sixty-five, his pension benefits were reduced by approximately one-half; therefore, Pennington currently receives $7,692 per year in pension benefits and no health insurance benefits. Had Pennington remained employed by Defendant until age sixty-five, he

would have received twice the amount that he currently receives in pension benefits for his life expectancy of 79 years.

Cunningham began working for Litton Industries in 1966, and was eventually promoted to senior mechanical engineer. Cunningham was also terminated as a result of a workforce reduction. Cunningham was fifty-nine years old at the time of his termination in 1993, and like Pennington, had planned to work until the age of sixty-five. At the time of his termination, Cunningham earned an annual salary of $47,164, and received health, pension and life insurance benefits as part of his employment benefits package. Cunningham currently receives $12,276 per year in pension benefits and no health insurance benefits. Had Cunningham remained employed by Defendant until age sixty-five, he would have received annual pension benefits in the amount of $23,548.75 for his average life expectancy of 78.8 years.

Cunningham's pension and medical costs to Defendant would have been $7,110 per year for fiscal years 1994-1997. Pennington's pension and medical costs to Defendant would have been $2,256 per year for fiscal years 1994-1997. Defendant's ten-year pension and medical costs savings on all older employees offered early retirement during the "down-sizing" was $12,262,176.71.

In 1992, Keith Wheeler, President of the MHD, and Barbara Carr, a Human Resources Department employee, asked Steven Parsley, the manager of Systems Analysis Engineering, to modify a Lotus spreadsheet that sorted employee information by name, birth date, date of hire, whether the employee smoked, and the employee's benefit program information. Wheeler and Carr informed Parsley that they were interested in reducing salaries and medical costs and that they were not concerned about lawsuits. In that same year, Plaintiff Cunningham and three other senior project engineers were left in the engineering department. The head

of the engineering department, Jim Gable, told Cunningham and the other three engineers that they were marked for lay-off, but that their names were removed from the list on the advice of Litton's lawyers. In 1993, all four of the senior project engineers either took an early retirement or were terminated as part of Defendant's alleged reduction in workforce plan. One of the senior project engineers, Mr. Shirley, took an early retirement, but was then hired back by Defendant as a contractor receiving no benefits associated with his pay.

Also in 1992, Bill Hines was hired by Litton to "interface with employees" and to recruit new employees; in 1993, Hines actively recruited at Georgia Tech and other institutions for openings in the engineering department. In February of 1993, Defendant hired twenty-four new employees.

Hines prepared a reduction in workforce memorandum entitled "HIGH RISK" which flagged employees by salary, age, disability, premature births of children, surgeries, and exemption status. Plaintiff Cunningham's name was on the "HIGH RISK" list and his age was highlighted. Hines testified that Defendant's Human Resources department made the selections of which employees would be terminated in connection with the reduction in workforce plan. Plaintiffs' expert witness, Dr. Harvery Rosen, testified that Defendant's pattern of downsizing was not age neutral inasmuch as more employees over the age of fifty were terminated than would be expected in a random process.

Defendant's stated reason for terminating Pennington was that Pennington had the lowest evaluations in his department. However, Pennington's former supervisors did not criticize his work performance, and Pennington's former supervisor, Mike Vogt, could not recall any problems with Pennington's work. Notably, Pennington's supervisor from 1982 through February of 1992, Robert Malone, thought that Pennington's

work was meticulous, gave Pennington satisfactory performance evaluations, and rated Pennington's work as "excellent."

Defendant's stated reasons for terminating Cunningham was because he (1) did not meet schedules; (2) did not use Computer Aided Design technology; and (3) disrupted the workplace. However, David Gilkes, Cunningham's immediate supervisor, evaluated Cunningham's performance as "above-quality work" in Cunningham's 1993 performance evaluation. Cunningham's co-worker, Randy Coons, worked with Cunningham from 1982 through 1992, and stated that he never witnessed Cunningham disrupting the workplace. Another co-worker, Robert Flaig, testified that Cunningham met schedules, worked on the Computer Aided Design technology, always maintained a professional attitude, and did not disrupt the workplace.

Defendant's pension and savings program was a combination of a 401K and standardized pension fund, where Defendant contributed part of the funds and, during an employee's final years of employment, Defendant's contributions escalated.[1] The record indicates that Defendant contributed to Pennington and Cunningham's pension funds.

ANALYSIS

Case No. 98-6398—Appeal

Defendant argues that the district court erroneously concluded that Defendant was motivated by its specific intent to interfere with Plaintiffs' pension benefits when it laid Plaintiffs off from their jobs. We disagree.

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[1] Defendant argues on appeal that the pension fund was over-funded; however, as noted by Plaintiffs, Defendant does not support this argument with statistical data for the year in question—1993; rather, Defendant uses data reflecting the status of the fund in 1995, after Plaintiffs and other employees were terminated or took early retirements. (J.A. at 172.)

This Court reviews a district court's findings of fact for clear error, and a district court's conclusions of law *de novo*. *Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 503 (6th Cir. 1998). "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." *See Ellis v. Diffie*, 177 F.3d 503, 505 (6th Cir. 1999) (quoting Fed. R. Civ. P. 52(a)). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

In *Smith v. Ameritech*, this Court announced the requirements that a plaintiff must meet in order to state a claim under ERISA § 510 as follows:

> To state a claim under § 510, the plaintiff must show that an employer had a specific intent to violate ERISA. In the absence of direct evidence of such discriminatory intent, the plaintiff can state a *prima facie* case by showing the existence of (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled.
>
> Although . . . not classif[ied] . . . as part of the plaintiff's *prima facie* case, . . . a plaintiff must show a causal link between pension benefits and the adverse employment decision. In order to survive [the] defendants' motion for summary judgment, [the] plaintiff must come forward with evidence from which a reasonable jury could find that the defendants' desire to avoid pension liability was a determining factor in [the]

> plaintiff's discharge. . . . [I]n an interference claim, the alleged illegal activity will have a causal connection to the plaintiff's ability to receive an identifiable benefit.

129 F.2d 857, 865 (6th Cir. 1997) (internal quotation marks and citations omitted).

Here, the district court concluded that "it is not really disputed that the plaintiffs have established a prima facie case [of interference under § 510]. By terminating the plaintiffs at ages 59 and 60, the defendant avoided paying the additional benefits to which the plaintiffs would have become entitled. The issue, here, is whether the plaintiffs established the necessary causal link between the pension benefits and the adverse employment decision." (J.A. at 81-82.) Having so concluded, the district court then addressed whether Defendant advanced a legitimate reason for terminating Plaintiffs, and whether Plaintiffs sufficiently rebutted the alleged legitimate reason for discharge. The court further concluded as follows:

> 3. The defendant proffered the following reasons for selecting the plaintiffs for termination: poor performance, disrupting the workplace, and failing to use CAD. The plaintiffs offered substantial evidence (stated above) that the plaintiffs were in fact above average performers, did not disrupt the workplace and did in fact use CAD. The court, with the aid of an advisory jury, disbelieved the proffered reason for discharge.
>
> 4. Once a plaintiff has disproved the defendant's proffered reason for termination, the fact finder is entitled to infer a discriminatory reason for such termination. *Kline v. Tennessee Valley Authority*, 128 F.2d [sic] 337 (6th Cir. 1997). In this case, the plaintiff[s] offered evidence to disprove the defendant's stated reason[s] for termination. The

> court, with the aid of an advisory jury, chooses to infer that a desire to reduce pension liability was a determining factor in the plaintiffs' discharge.

(J.A. at 82.)

A. Whether Plaintiffs Established a *Prima Facie* Case Under ERISA § 510

On appeal, Defendant claims that the district court's conclusion that Plaintiff established a *prima facie* case of interference was erroneous. Relying upon *Humphreys v. Bellaire Corp.*, 966 F.2d 1037 (6th Cir. 1992) and *Rush v. United Technologies, Otis Elevator Division*, 930 F.2d 453 (6th Cir. 1991), Defendant argues that "this Court repeatedly has found that an employee's incidental loss of the opportunity to accrue additional benefits is not evidence of unlawful ERISA interference with pension rights[,]" and thus, the district court erroneously concluded that Plaintiffs established a *prima facie* case simply because Defendant avoided paying additional pension benefits to Plaintiffs by laying them off. Defendant contends that Plaintiffs failed to present evidence of a specific intent by any of Defendant's employees to violate § 510; or, said differently, that Plaintiffs failed to present any evidence to show that Defendant's desire to avoid pension liability was a determining factor in the Plaintiffs' discharge, and that the district court erroneously concluded that Plaintiffs established a § 510 case in the absence of such evidence.

In *Humphreys v. Bellaire Corp.*, 996 F.2d at 1043-45, this Court reviewed the district court's grant of summary judgment to a defendant corporation regarding the plaintiff's ERISA § 510 claim and, after setting forth the requirements that the plaintiff had to meet in order to state a *prima facie* case under § 510 as well as the burden shifting analysis which a court must conduct after the plaintiff establishes a *prima facie* case, the Court found as follows:

> [The Plaintiff] met his burden of presenting evidence to support each of the elements of a *prima facie* case. He was discharged, and it was his testimony that his pension would have vested in two months and that this would have cost the company a substantial amount. Although it is no more than the bare minimum that a plaintiff must show to meet the *prima facie* case threshold, in this case it satisfies that low threshold because, examining only [the plaintiff's] evidence, the proximity to vesting provides at least some inference of intentional, prohibited activity.

This holding, when juxtaposed against that the district court's conclusion in the instant case, indicates that the district court did not err in concluding that Plaintiff established a *prima facie* case under § 510. As stated, the district court found that "it is not really disputed that the plaintiffs have established a prima facie case [of interference under § 510]. By terminating the plaintiffs at ages 59 and 60, the defendant avoided paying the additional benefits to which the plaintiffs would have become entitled. The issue, here, is whether the plaintiffs established the necessary causal link between the pension benefits and the adverse employment decision." (J.A. at 81-82.) Accordingly, as in *Humphreys,* the district court did not err in concluding that Plaintiffs established a *prima facie* case based upon the proximity of Plaintiffs' discharge to their age of receiving full retirement benefits.

We are not persuaded otherwise by Defendant's reliance upon *Rush v. United Technologies, Otis Elevator Division,* 930 F.2d 453 (6th Cir. 1991). Defendant claims that *Rush* supports his position that the district court erred in concluding that Plaintiffs established a *prima facie* § 510 case. However, upon close examination of Defendant's argument, one observes that Defendant is not quoting from the facts of *Rush* in his brief on appeal to this Court, but from a case issued by

the United States Court of Appeals for the Fifth Circuit upon which *Rush* relied. *See* Defendant's Brief on Appeal at 14 (quoting *Clark v. Reistoflex Co.*, 854 F.2d 762, 771 (5th Cir. 1988) without attribution to that case). Moreover, Defendant's quotation from the *Clark* case is inaccurate to the extent that Defendant added language from the *Rush* opinion to the *Clark* quote.

Defendant's inaccurate and misleading argument aside, the facts of *Rush* are distinguishable from those of the instant case inasmuch as in *Rush*, the plaintiff was claiming that the defendant discharged him in violation of § 510 in order to keep the plaintiff from being eligible for the expanded early retirement benefits which became effective after the plaintiff's discharge. *Rush*, 930 F.2d at 457. However, because the plaintiff failed to produce *any* evidence that anyone at the defendant company had knowledge that the pension plan was going to be amended seven weeks after the plaintiff's discharge, and because the plaintiff failed to produce any evidence that he had ever told anyone at the company that he had planned to retire early if possible—in fact, the plaintiff stated in his deposition that he may not have retired early even if provided the opportunity, this Court concluded that the plaintiff failed to establish that his discharge was motivated by the defendant's intent to interfere with the plaintiff's retirement benefits. *Id.* at 457-58.

Unlike in *Rush*, the evidence in the instant case established that Defendant *was* aware that terminating Plaintiffs before the age of sixty-five would interfere with an established retirement benefit (the amount of annual pension funds received)—i.e., the additional annual pension funds received by Plaintiffs had they worked until sixty-five-years of age was known to both Plaintiffs and Defendant alike. Evidence of Defendant's knowledge that they were interfering with Plaintiffs', as well as other employees' benefits, was noted by the district court in its findings of fact:

15. In 1992, Keith Wheeler, President of the Material Handling Systems Group, and Barbara Carr, a Human Resources Department employee, asked Steven Parsley, the manager of Systems Analysis Engineering, to modify a Lotus spreadsheet that sorted employee information by name, birth date, date of hire, whether the employee smoked, and benefit program information.

16. Wheeler and Carr told Parsley that they wanted to reduce salaries and medical costs and that they were not concerned about lawsuits.

17. According to plaintiffs' expert witness, Dr. Harvey Rosen, the pattern of terminations during the Western Atlas downsizing was not age neutral because more people age 50 and over were terminated than would be expected in a random process.

(J.A. at 79.)

Therefore, Defendant's reliance upon *Rush* is misplaced, as is its reliance upon *Humphreys,* where *Rush* is distinguishable and *Humphreys* supports the district court's conclusions and inures to the benefit of Plaintiffs. Having so opined, we hold that the district court did not err in concluding that Plaintiffs established a *prima facie* case under ERISA § 510, which brings us to Defendant's alternative argument; namely, even if the district court was correct in finding that Plaintiffs established a *prima facie* case, the district court erred in concluding that Defendant's alleged reasons for Plaintiffs' discharge were pretextual.

B. Whether Plaintiffs Established that Defendant's Alleged Reasons for Their Terminations were a Mere Pretext to Allow Defendant to Interfere with Plaintiffs' Retirement Benefits

Defendant argues in the alternative that the district court erred in concluding that Defendant's articulated reasons for Plaintiffs' layoffs were pretextual. Specifically, Defendant contests the following conclusion of law made by the district court:

> 3. The defendant proffered the following reasons for selecting the plaintiffs for termination: poor performance, disrupting the workplace, and failing to use CAD. The plaintiffs offered substantial evidence (stated above) that the plaintiffs were in fact above average performers, did not disrupt the workplace and did in fact use CAD. The court, with the aid of an advisory jury, disbelieved the proffered reason[s] for discharge.

(J.A. at 82.) Defendant claims that the district court erred in so concluding "because the disbelief of the proffered reason[s] by the Court (and the advisory jury) is simply a disagreement with Western's business judgment — Plaintiffs did not show pretext under the test established by *Manzer v. Diamond Shamrock,* 29 F.3d 1078, 1083-84 (6th Cir. 1994) and *Kline v. Tennessee Valley Authority,* 128 F.3d 337 (6th Cir. 1997)[.]" We disagree.

In *Manzer,* a case brought under the ADEA, this Court explained what evidence a plaintiff must adduce in order to show that an employer's alleged legitimate reason for its adverse action against the plaintiff was a mere pretext:

> To make a submissible case on the credibility of his employer's explanation, the plaintiff is required to show by a preponderance of the evidence either (1) that the proffered reasons had no basis in fact, (2) that the

proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge. The first type of showing is easily recognizable and consists of evidence that the proffered bases for the plaintiff's discharge never happened, i.e., that they are factually false. The third showing is also easily recognizable and, ordinarily, consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff. These two types of rebuttals are direct attacks on the credibility of the employer's proffered motivation for firing plaintiff and, if shown, provide an evidentiary basis for what the Supreme Court has termed "a suspicion of mendacity."

The second showing, however, is of an entirely different ilk. There, the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct could motivate dismissal. The plaintiff's attack on the credibility of the proffered explanation is, instead, an indirect one. In such cases, the plaintiff attempts to indict the credibility of his employer's explanation by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant. In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it "more likely than not" that the employer's explanation is a pretext, or a coverup.

Accordingly, we hold that, in order to make this type of rebuttal showing, the plaintiff may not rely simply upon his *prinia facie* evidence but must, instead, introduce additional evidence of age discrimination.

Manzer, 29 F.3d at 1084.[2]

Here, the district court found as follows regarding Defendant's proffered reasons for discharging Plaintiffs, and Plaintiffs' evidence to rebut those reasons:

> 8. The defendant's stated reason for terminating Pennington was that he had the lowest evaluations in his department.
>
> 9. Individuals from Western Atlas' Human Resources Department provided Pennington's supervisor with the names of the individuals to be laid off.
>
> 10. Pennington's former supervisors had no criticism of Pennington's work. Indeed, Malone, Pennington's supervisor from 1982 through 1992, rated Pennington's work satisfactory to above satisfactory and stated that his work was excellent.
>
> 11. The defendant provided the following reasons for selecting Cunningham for termination: (1) he did not meet schedules; (2) he did not use Computer Aided Design (CAD); and (3) he disrupted the workplace.
>
> 12. Gilkes, Cunningham's immediate supervisor, evaluated Cunningham as performing "above quality work" on his 1993 evaluation.
>
> 13. Coons, who worked with Cunningham from 1982 through 1992, testified that he had never witnessed Cunningham disrupting the workplace. Furthermore, Cunningham had performed contract work for Acculift since his termination from Western Atlas, and, while at Acculift, Cunningham met all schedules.

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[2] *Kline* also dealt with the requirements for showing pretext; however. the plaintiff in *Kline* brought claims under the ADEA as well as under Title VII. *See* 128 F.3d at 339, 349-51.

14. Flaig, who also worked with Cunningham, testified that Cunningham met schedules, worked on CAD, always maintained a professional attitude, and did not disrupt the workplace.

(J.A. at 78-79 (transcript cites omitted).) Accordingly, as found by the district court, and as supported by the record, Plaintiffs did not merely rely upon their *prima facie* evidence that their discharge resulted in a decrease in pension benefits and that Defendant had been looking for ways to decrease its costs associated with employee benefits, to show that Defendant's proffered reasons for terminating Plaintiffs were a mere pretext. Rather, Plaintiffs came forward with additional evidence which specifically rebutted Defendant's alleged reasons for terminating each Plaintiff.

Plaintiffs' evidence offered to rebut Defendant's alleged reasons consisted of the type one evidence as well as the type two evidence described in *Manzer*. That is to say, evidence that Defendant's claims were factually false, as well as evidence that circumstances were such that it was more likely than not that Defendant had an improper motive in discharging Plaintiffs. *See Manzer*, 29 F.3d at 1084. For example, Plaintiffs offered evidence by way of performance appraisals that their supervisors rated their work above quality or excellent just one year to a few months before their discharge, so as to indicate that Defendant's claims that Pennington received low evaluations and Cunningham did not finish his work on time or use the state of the art equipment were false. *See id.* Plaintiffs also introduced evidence to show that Defendant was seeking to cut costs associated with benefit payments, and that the pattern of terminations was that more people over the age of fifty were terminated than would be expected in a random process, so as to indicate that it was more likely than not that Defendant was trying to cover-up its true motivation in discharging Plaintiffs. *See id.*

As such, Defendant's claim on this issue fails. *See Manzer,* 29 F.3d at 1084. We are further persuaded in our opinion by the fact that an advisory jury rendered its decision in this case, the credibility of witnesses is involved in ascertaining pretext, and that this Court should give "due regard" to the jury's determination of credibility. *See Ellis,* 177 F.3d at 505; Fed. R. Civ. P. 52(a).

Case No. 98-6416—Cross-Appeal

Plaintiffs cross appeal arguing that the jury's verdict in favor of Defendant on Plaintiffs' ADEA claim was against the great weight of the evidence. In order to preserve a challenge to a jury verdict as being against the great weight of the evidence, the appellant must have made a motion for a new trial in district court. *See Dixon v. Montgomery Ward,* 783 F.2d 55 (6th Cir. 1986). Failure to do so precludes appellate review. *Id.* (quoting 6A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice, ¶ 5915[3] at 59-326 to 327 (2d ed. 1985) noting that "the discretionary power of the district court to give relief from an error of fact must first be invoked").

Here, Plaintiff failed to make a motion for a new trial or judgment notwithstanding the verdict in district court in relation to their claim that the jury's verdict was against the great weight of the evidence. Therefore Plaintiffs' claim is not properly before us—as conceded by Plaintiffs at oral argument. *See Cone v. West Virginia Pulp & Paper,* 330 U.S. 212, 216 (1947) ("Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate transcript can impart.").

CONCLUSION

For the above stated reasons, the district court's judgment is AFFIRMED in Case No. 98-6398 as well as in Case No. 98-6416.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Mar 24, 2000]

98-6398/6416

ALEX PENNINGTON; HAROLD GENE CUNNINGHAM,
Plaintiffs-Appellees/Cross-Appellants,

v.

WESTERN ATLAS, INC.,
Defendant-Appellant/Cross-Appellee.

ORDER

BEFORE: KEITH, NORRIS, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
LEONARD GREEN CLERK